

WILLIAM D. BROWN

IBLA 93-407

Decided November 6, 1996

Appeal from a decision of the Arizona State Office, Bureau of Land Management, denying a protest against dependent resurvey A-27741.

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

Because there was no remaining evidence of an original corner of four sections that was the subject of a dependent resurvey conducted in 1990, BLM properly found the corner was lost and reestablished it using double proportionate measurement.

2. Surveys of Public Lands: Generally--Surveys of Public Lands: Dependent Resurveys

An allegation that a dependent resurvey is void because it impairs bona fide rights lacks foundation when BLM records show the survey to be an accurate retracement and reestablishment of lines of the original survey and no contrary evidence appears in the record.

APPEARANCES: William D. Brown, Rimrock, Arizona, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

William D. Brown has appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated March 31, 1993, dismissing his protest of a 1990 dependent resurvey of T. 14 N., R. 5 E., Gila and Salt River Meridian, Arizona. The dependent resurvey was initiated at the request of the Forest Supervisor, Coconino National Forest, following Brown's petition for review of an administrative survey conducted by the Forest Service in 1973 that reestablished the corner of secs. 2, 3, 10, and 11. The dependent resurvey was conducted in 1990 pursuant to "Special Instructions for Group No. 722, Arizona," dated August 22, 1990. An official plat of survey was accepted November 13, 1991, and filed on November 21, 1991; notice of the filing was published in the Federal Register on February 13, 1992 (57 FR 5274). Brown disputes the survey determination that the corner of secs. 2, 3, 10, and 11 was a lost corner and its reestablishment by the dependent resurvey.

The original survey was conducted by C. Burton Foster, Deputy Surveyor, in 1877. Foster established the subject corner and monumented it with a limestone, 28 by 20 by 16 inches, notched and "set 3/4 in the ground" with a mound of stone on the northside. Foster also marked a single bearing tree, a sycamore 20 inches in diameter, bearing S. 87° W., 120 links distant (a link is 7.92 inches long). A number of other surveys in the township have been conducted by the Government since Foster's. In 1931 the west half of the line between secs. 9 and 16 was resurveyed and the corner of secs. 10, 11, 14, and 15 was reconstructed. In 1938 a portion of the exterior boundaries and subdivisional lines of T. 14 N., R. 5 E. was resurveyed and a completion survey was conducted of a portion of the east boundary, a portion of the subdivisional lines, and a portion of the subdivision of secs. 8, 16, and 17. During this survey, the corner of secs. 10, 11, 14, and 15, as reconstructed in 1931, was identified and redesignated to refer to secs. 10 and 11 only. In 1964 the corner of secs. 2, 3, 34, and 35 was remonumented on the north boundary of the township by a cadastral surveyor. In 1973 the Forest Service conducted a dependent resurvey of sec. 10, T. 14 N., R. 5 E. The surveyor found no evidence of the original corner of secs. 2, 3, 10, and 11, but did find a monument at the corner of secs. 1, 2, 11, and 12 dated 1938; he noted an old wire fence 3 feet north thereof, "from which fences bear irregular East and West." He also identified the monument reset in 1964 at the corner of secs. 2, 3, 34, and 35 and noted that the corner was located by a fence corner "with fences bearing E., W., and N."

Private surveys have also been conducted in the township. In 1962, Collar, Williams, and White Engineering (Collar) conducted a survey of the subdivision, "Montezuma Park, Unit 9," purported to be in a portion of the southwest quarter of sec. 2. In 1964, Collar conducted the survey of "Lake Montezuma Agricultural Acres" which adjoins "Montezuma Park, Unit 9" to the north and west. A narrative description furnished with the 1964 Collar survey refers to an "original U.S.G.L.O. Sycamore bearing tree" used by Collar to establish the southwest corner of sec. 2. The 1964 Collar plat shows the 1962 position for the corner of secs. 2, 3, 10, and 11 and then identifies that position as being in error and depicts a new position for the corner 53.07 feet away from the 1962 position. The dependent resurvey does not accept this corner. Brown seeks to have the corner identified by Collar in 1964 declared to be the original corner.

A dependent resurvey is a retracement and reestablishment of the lines of the original survey in their true original positions; in legal contemplation and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical. Manual of Instructions for the Survey of the Public Lands of the United States (1973), (Manual) 6-4 at 145; John W. & Ovada Yeargan, 126 IBLA 361, 363 (1993). In reviewing a resurvey after a plat is filed, the party challenging the resurvey must establish by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous. Kendal Stewart, 132 IBLA 190, 193 (1995), James O. Steambarge, 116 IBLA 185, 188 (1990). Brown does not argue that the resurvey was

fraudulent; he argues that BLM erred in finding that the corner of secs. 2, 3, 10, and 11 was a lost corner and also in locating the reestablished corner. Brown argues that the corner was not lost but obliterated and asserts that BLM failed to fully develop original and collateral evidence to determine the original section corner location. He also contends BLM ignored relevant private surveys, thereby impairing the bona fide rights of the private landowner.

It is well established that BLM should reestablish a corner in accordance with evidence of its original position if at all possible. See United States v. Doyle, 468 F.2d 633, 637 (10th Cir. 1972); Longview Fibre Co., 135 IBLA 170, 177 (1996); Manual 5-21, at 133. A lost corner

is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners.

(Manual 5-20 at 133). An obliterated corner is

one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence.

(Manual 5-9 at 130).

Brown contends that BLM failed to fully develop original and collateral evidence to determine the original corner of secs. 2, 3, 10, and 11. His first argument in his statement of reasons (SOR), which concerns the bearing tree, is not clear. Earlier correspondence from Brown to BLM and the BLM decision indicate, however, that he argues the tree identified by Collar in 1964 as the original bearing tree is an offshoot thereof and occupies the same location as did the original tree. Brown and BLM agree that the sycamore tree identified in Collar's 1964 survey is not the original bearing tree because it is too young and, unlike the original, it is a forked tree. In a May 29, 1992, letter to BLM, Brown maintained that it was well known that sycamore trees produce offshoots that end as forked trees after the mother tree has died and that the tree used by Collar to establish the corner was an offshoot of the original bearing tree. Thus, Brown is arguing that the tree marked by Collar, as an offshoot of the bearing tree identified by Foster in 1877, should be treated as if it were the original bearing tree.

Nonetheless, there is no evidence that the forked sycamore Brown sees as an offshoot of that original bearing tree is indeed an offshoot of that tree and not just another sycamore tree that has grown near the creek

wherein BLM's surveyor located the disputed corner. See Field Notes at 6. BLM asserts, and Brown does not disagree, that there are numerous sycamore trees along the banks of Beaver Creek. The notes of the 1877 survey also indicate there were then cottonwood, ash, and sycamore trees along Beaver Creek. There is no suggestion there was only one sycamore tree in 1877, although the surveyor reported there was "no other tree near." Stephen K. Hansen, the cadastral surveyor who performed the dependent resurvey, spoke with the Collar field surveyor, Wally Largo, who allegedly found the "original GLO bearing tree" during his 1964 survey. Largo could not recall finding the "bearing tree" but stated that if he had, he would have described it in his field notes. No description of such a tree from Largo's field tablets has been provided, however. Even assuming the sycamore noted by Collar is an offshoot of a sycamore tree, there is no proof that this sycamore has any connection with the bearing tree, as it could be an offshoot from any sycamore tree. Therefore, we conclude that BLM properly refused to consider the tree identified by Collar as marking the location of the 1887 bearing tree. See Longview Fibre Co., supra.

In his SOR, Brown refers to topographic calls made to a road, an irrigating ditch and a marsh in the original 1877 survey notes. The 1877 survey identified a road 64.70 chains north of the corner of secs. 10, 11, 14, and 15, an irrigating ditch at 65.50 chains, cultivated land and finally marsh and willow growth at 75 chains. There was, as a result, a distance of 0.80 chains (52.8 feet) from the road to the ditch, a cultivated field 9.5 chains (627 feet) wide, and a marsh some 10.3 chains (679.8 feet) from the road. Brown contends that based on 1946 aerial photos, a 1966 survey of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 10, and physical evidences on the land, the BLM resurvey would yield a measurement of 200 feet between road and ditch and a field 490 feet in width. Further, he contends, old fence lines approximately 100 feet west of the BLM line yield a measurement of approximately 50 feet from road to ditch and 640 feet across the cultivated field, which he concludes is very close to the original survey.

The field notes of the dependent resurvey identify a road at 65 chains from the south corner of secs. 10 and 11, the south edge of a cultivated field at 67.50 chains, an irrigating ditch at 76.35 chains and the south edge of a marsh at 77 chains (Field Notes at 6). Contrary to Brown's assertion, the cultivated field is 8.85 chains (584 feet) wide. Moreover, since the 1877 survey, the irrigating ditch reported near the road has ceased to exist and a new one has been constructed on the other side of the cultivated field. If that new ditch were added to the cultivated field, it would be 9.5 chains wide. The real difference in the two surveys is that, since the original survey, the distance from the road to the marsh has increased to 12 chains (792 feet) which could be explained by the marsh naturally receding or being partially reclaimed.

Both the road and the 1877 irrigating ditch are in a flood plain, which raise the possibility that they have been altered by periodic

flooding; therefore neither feature provides evidence of location beyond a reasonable doubt. This circumstance illustrates the difficulty of relying on topographic calls. That topographic references usually provide only a general frame of reference or identification of a given point is, according to the Manual, a limitation on this means of orientation. The Manual explains that:

The determination of the original corner point from even fragmentary evidence of the original accessories, generally substantiated by the original topographic calls, is much stronger than determination from topographic calls alone. In questionable cases it is better practice, in the absence of other collateral evidence, to turn to the suitable means of proportionate measurement.

(Manual 5-16 at 132). Prior decisions of this Board have recognized and applied the Manual rule that topographic calls should focus on a definite, small area, such as an old fence, if they are to have utility in retracing a missing corner. See Boise Cascade Corp., 115 IBLA 327 (1990); Alfred Steinhauer, 1 IBLA 168 (1970). Brown maintains that the old fences are of use here. He asserts that fence lines between secs. 2 and 3 and secs. 10 and 11, identified by Datum Land Surveying, line up with each other and with the calls of distances between the road and ditch. He argues this is evidence that the fences started at established corners and indicates landowner knowledge of the monuments existing at the time and that their perpetuation through fencing points out the missing monument.

BLM does not dispute the fact that fences existed in the vicinity at one time. The dependent resurvey noted the position of all fences in the immediate area but found no evidence they were ever intended to be more than approximations of section lines. Moreover, neither fence line cited by Brown originates at an identified original corner, nor does either fence line terminate in the immediate area of the corner of secs. 2, 3, 10, and 11. The dependent resurvey identified a fence line between secs. 10 and 11 as originating at the corner of fences extending north and east, 98 links northeast of the corner of secs. 10 and 11 (Field Notes at 4). The other fence line identified by Brown originates near the E 1/16 section corner of secs. 3 and 10, a corner not monumented in the original survey, and terminates on the edge of a bluff overlooking Beaver Creek (Field Notes at 12, 6). As we recognized in James O. Steambarge, *supra* at 193, a corner cannot be said to be obliterated based on such evidence, unless it be shown that an old fence was built "to an accepted corner established by [an original] survey or that any fence started at and terminated at established corners of that survey." Brown has produced no evidence that the corner, as determined by the dependent resurvey, is in a position other than that of the original survey. His argument on this point is insufficient, without supporting evidence, to establish that the old fences were a property boundary of any land or originated at an established corner.

Brown contends that BLM ignored previous surveys and recorded division plats. He lists four surveys done between 1962 and 1966 by professional engineering companies and asserts they were based on evidence of the original bearing tree as witnessed by Collar. BLM did not, however, ignore those private surveys. Special instructions provided for BLM's resurvey included a requirement to research all applicable county and private sources for survey data and to evaluate relevant private surveys. The instructions also stated that every effort was to be made to recognize such surveys if properly made (Instructions at 2). Upon performing the resurvey, Hansen located the sycamore tree Collar identified as the bearing tree but rejected it as too young and found that improper procedures had been used by Collar to set the corner. Hansen also attempted to gain access to Collar's field books in order to evaluate the surveys but his request was initially denied. When he was granted access, on July 8, 1992, he went through the field books and correspondence of Collar for the 1962 and 1964 surveys but found nothing of "extraordinary magnitude," and after consulting with other BLM surveyors he decided to leave the survey as it was.

[1] The BLM decision reviewed both the 1962 and 1964 surveys and found that Collar failed to follow established BLM procedures and standard survey practice and that neither the 1962 nor 1964 position could be used in the course of the dependent resurvey. During review of the 1962 Collar survey BLM discovered that Collar had determined the corner in question to be lost and reestablished it by single proportionate measurement between the corner of secs. 1, 2, 11, and 12 and the 1/4 section corner of secs. 3 and 10. The Manual, however, requires double proportionate measurement to reestablish a lost corner of four sections (Manual 5-28 at 134). The double proportionate measurement is used so that latitudinal and longitudinal discrepancies are equitably distributed. Single proportionate measurement is inappropriate in such cases, because it considers measurements in only two directions, while the original survey returned measurements in all four directions.

BLM also found a number of flaws in the 1964 Collar survey. It was noted that there was no description of how the "true" southwest corner of sec. 2 was determined, but that by correlating data contained in the description and on the survey plats of the two subdivisions it was deduced that Collar used the sycamore as if it were the original bearing tree, but then did not follow Manual procedures to reestablish a corner. Instead, Collar determined the corner of secs. 2, 3, 10, and 11 at record distance from the presumed bearing tree, and then apparently rotated the bearing to preserve the south boundary of sec. 2 as depicted on their survey plat of Montezuma Park, Unit 9.

In the dependent resurvey here under review, BLM used the double proportionate method to reestablish the corner. Hansen found verified original corner positions at the 1/4 section corner of secs. 2 and 3, the 1/4 section corner of secs. 3 and 10, the corner of secs. 1, 2, 11, and 12, and the corner of secs. 10 and 11 (Field Notes at 9, 12, 7, 4). With one exception, the controlling corners were all iron post monuments established

from evidence discovered in the surveys of 1931 and 1938. The monument for the 1/4 section corner of secs. 2 and 3 was known to have been destroyed in 1964 but the position of the corner was determined by ties from lot corners established by Collar in 1964, and there was also a chain of events relating it to the original monument (Field Notes at 9).

In Jacobsen & Downer v. BLM (On Reconsideration), 103 IBLA 83 (1988), aff'd, Downer v. Hodel, No. 91-15372 (9th Cir. 1992), we found that "the proper standard for BLM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence." Id. at 86. Where physical evidence has entirely disappeared, a corner will not be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location (Manual 5-5 at 130). There must, however, be substantial evidence of a perpetuated corner location in order to consider the corner obliterated, rather than lost. James O. Steambarge, supra at 191. No such evidence is present in this case. Brown contends that Collar found the original bearing tree, through its offshoot. The sycamore tree Brown refers to was washed away in January 1993 (SOR at 1), but even if it still existed there would be no way to identify it as an offshoot of the bearing tree. Further, there is no proof that old fences found by their survey followed the section lines or originated at monumented corners. There is, therefore, no physical evidence, nor any witness testimony, of the original location of the corner of secs. 2, 3, 10, and 11. BLM reviewed the private surveys and found flaws in the way they located the corner at issue. We conclude that BLM, in its 1990 dependent resurvey, properly considered the corner lost and reestablished it in accordance with the requirements of the Manual. Because Brown has failed to establish by a preponderance of the evidence that the establishment of the corner in question by the dependent resurvey was grossly erroneous, BLM's decision dismissing the protest against the survey must be affirmed.

[2] Brown alleges that the subject dependent resurvey is void because it impairs his bona fide rights. The Secretary of the Interior has a duty to consider and determine what lands are public lands and has authority to correct the surveys of public lands as may be necessary. See 43 U.S.C. §§ 2, 52, 751-753, 773 (1994); Kirwan v. Murphy, 189 U.S. 35 (1903); Mr. & Mrs. John Koopmans, 70 IBLA 75, 76 (1983). A resurvey, however, can affect bona fide rights only in the matter of position or location on the earth's surface (Manual 6-13 at 147). Bona fide rights are protected in a resurvey by showing "the original position of entered or patented lands included in the original description" (Manual 6-14 at 147). "The position of a tract of land, described by legal subdivisions, is absolutely fixed by the original corners and other evidences of the original survey and not by occupation or improvements, or by the lines of a resurvey which do not follow the original" (Manual 6-15 at 147). If Brown's rights in the lands at issue are based on patents grounded on the original survey, then the dependent resurvey will not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey.

(Manual 6-25 at 149). Proper execution of a dependent resurvey serves to protect the bona fide rights of landowners because a dependent resurvey traces the lines of the original survey. Since Brown has offered no evidence to the contrary, it must be concluded that the dependent resurvey under review is an accurate retracement and reestablishment of the lines of the original survey.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arnese
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge

